

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

SHERRI LYNN GOLDSMITH,

Defendant and Appellant.

F071723

(Super. Ct. No. F12906208)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Carol Foster, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Paul A. Bernardino, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

* Before Hill, P.J., Detjen, J. and Peña, J.

Appellant Sherri Lynn Goldsmith appeals from the denial of her petition for resentencing, filed pursuant to Proposition 47. Appellant contends she was eligible for resentencing on her 2012 conviction for second degree burglary (Pen. Code, §§ 459, 460, subd. (b))¹ because she entered a commercial establishment with the intent to commit larceny through the presentation of a forged check. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2012, appellant was charged with check forgery (§ 470, subd. (d); count 1) and second degree burglary (§§ 459, 460, subd. (b); count 2). In August 2013, appellant pled no contest to count 2. In exchange, charges in two other cases were dismissed. Appellant was subsequently sentenced to probation.

Following enactment of Proposition 47, appellant petitioned to have her conviction reduced to a misdemeanor. At the hearing on the petition, appellant's crime was described as "an entry into the Money Mart in order to cash a stolen check." According to the probation report, appellant entered a Money Mart store, trying to pass a fraudulent check in the amount of \$703.26. Appellant was unable to cash the check and left without the check or any money.

The court denied appellant's petition, relying on an order from a prior case holding that entering a store with the intent to commit identity theft or entering with the intent to commit theft by false pretenses would not qualify as shoplifting under Proposition 47. This appeal timely followed.

DISCUSSION

Appellant argues the trial court erred by failing to recognize that entering a store with the intent to cash a fraudulent check qualifies as entering with the intent to commit

¹ All statutory references are to the Penal Code.

larceny as that term is properly understood with respect to shoplifting under Proposition 47.

Standard of Review and Applicable Law

“In November 2014, California voters enacted Proposition 47, which ‘created a new resentencing provision: section 1170.18. Under section 1170.18, a person “currently serving” a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be “resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” ’ ” (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448 (*Rivas-Colon*).)

“Proposition 47 added section 459.5, which classifies shoplifting as a misdemeanor ‘where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).’ (§ 459.5, subd. (a).) ‘[T]o qualify for resentencing under the new shoplifting statute, the trial court must determine whether defendant entered “a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours,” and whether “the value of the property that [was] taken or intended to be taken” exceeded \$950. (§ 459.5.)’ ” (*Rivas-Colon, supra*, 241 Cal.App.4th at p. 448.)

The trial court is tasked with determining whether a petitioner is eligible for resentencing. (§ 1170.18, subd. (b).) However, a petitioner has the initial burden of introducing facts sufficient to demonstrate eligibility. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880 (*Sherow*).)

The court’s review of the meaning of a voter initiative is de novo. (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1113-1114.) Factual findings of the trial court are

reviewed “for substantial evidence and the application of those facts to the statute de novo.” (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960.) The record is viewed in the light most favorable to the trial court’s ruling with a presumption that the order was correct. (*Ibid.*)

Appellant’s Conduct Does Not Qualify as Larceny

This court recently analyzed the meaning of the shoplifting statute and found that larceny, as used in that statute, should be interpreted according to its common law definition. (*People v. Martin* (Dec. 12, 2016, F071654) ___ Cal.App.5th ___, ___ [2016 Cal.App. LEXIS 1077, *25].) As such, to demonstrate eligibility, appellant must point to facts showing an intent to commit a trespassory taking, among other elements. (*Ibid.*) As we detailed in *Martin*, intending to commit theft by false pretenses does not qualify as larceny under this definition. (*Id.* at pp. ___-___ [*id.* at pp. *25-*26].) The facts as presented on appeal show appellant attempted to fraudulently obtain money through a transaction presented to the victim as legitimate. This fails to satisfy the common-law definition of larceny as there was no intent to commit a trespassory taking. Appellant’s second degree burglary conviction does not, therefore, qualify for resentencing.

DISPOSITION

The order is affirmed.